

For: State and County Offices

Endangered Species Act Section 7 Consultation

Approved by: Acting Deputy Administrator, Farm Programs



1 Overview

A Background

The Endangered Species Act of 1973 (ESA) mandates that all Federal departments and agencies conserve listed species and use their authorities in furthering the purposes of ESA.

To comply with ESA, FSA needs to follow the process as detailed in:

- Section 7(a)(2), in which Federal agencies will avoid actions that will further harm species and their critical habitat and will ensure that any action they authorize, fund, or carry-out does not jeopardize the continued existence of an endangered or threatened species or designated or proposed critical habitat, collectively referred to as “protected resources”
- 50 CFR Part 402, which specifies how Federal agencies are to fulfill their Section 7 consultation requirements.

B Purpose

This notice provides:

- clarification and further explanation of the current policy already in 1-EQ and does **not** include new or additional requirements
- guidance to State and County Offices on the steps required to complete Section 7 consultation requirements with FWS and, where applicable, the National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration Fisheries, collectively referred to as “the Services”
- Exhibits 1 and 2 to assist in determining the appropriate consultation required.

Disposal Date	Distribution
October 1, 2014 12-13-13	State Offices; State Offices relay to County Offices

2 FSA's Compliance Requirements

A Overview

Under 50 CFR Part 402, Federal agencies must review their actions and determine whether the action may affect Federally listed (threatened and endangered) and proposed species, or proposed or designated critical habitat. As is discussed in detail in subparagraph B, to accomplish this, Federal agencies must obtain from the Services a list of species and critical habitat that may be located in the project area, or the Services can request concurrence with their species list.

There is no similar requirement for Federal agencies to protect State-listed or -protected species or review their actions relative to impacts to those species.

Once an official Federal-protected resources list is obtained, Federal agencies need to determine whether their actions may affect any of those species or their critical habitat.

B Existing Agreements With Services

State Offices that have entered into signed Section 7 agreements with their local Service Offices should follow those agreement protocols.

State Offices that do **not** have Section 7 agreements with the Services shall follow the required consultation process outlined in subparagraph C.

- For those State Offices that do **not** have a formalized Section 7 agreement, in addition to following the steps in subparagraph C, it is recommended that State Environmental Coordinators:
 - work with the Services to develop their Section 7 consultation process through a formalized, legal agreement, such as Memorandum of Agreement (MOA)/Memorandum of Understanding (MOU)
 - add it to the State EQ handbook.
- Once MOA/MOU is in place with the Services, follow those protocols. Until then, follow subparagraph C.

2 FSA's Compliance Requirements (Continued)

C Required Consultation Process

The following table details the steps in the Section 7 consultation process. Exhibits 1 and 2 describe the steps that are required to comply with the Section 7 consultation requirements.

Step	Action
1	Receive the proposal or application.
2	<p>Acquire the protected resources list from the Services.</p> <ul style="list-style-type: none"> • Print out the protected resources list from the FWS local Field Office web site by county and/or request a protected resources list from NMFS • Official protected resources lists are only valid for 90 calendar days, so if a project review has taken longer, be sure to obtain a current list to ensure that users have the most accurate version. <p>FWS Action</p> <p>FWS has 2 options for obtaining an official protected resources list. There is not a preferred method.</p> <ul style="list-style-type: none"> • FWS Field Offices allow official species lists to be printed from their web sites by county. Go to either of the following web sites to locate the local FWS Ecological Services Field Office (there may be more than 1 per State): <ul style="list-style-type: none"> • http://www.fws.gov/offices/index.html • http://www.fws.gov/endangered/species/index.html. <p>Note: In FWS, the Endangered Species Program is in the Ecological Services Program.</p> <ul style="list-style-type: none"> • FWS has a new tool called the Information, Planning, and Conservation System (IPaC) at http://ecos.fws.gov/ipac/. <ul style="list-style-type: none"> • Some of the local Field Offices now have their web sites automatically go to the IPaC web site for their protected resources lists. This is a Field Office-by-Field Office decision. • This is a planning tool designed to assist with environmental reviews. Currently, it is primarily a landscape explorer tool, as it allows users to draw their site on a map and add layers, such as wetlands. Then it pulls up a site-specific species list, which depending on the FWS Field Office may be unofficial because the site remains under construction.

2 FSA's Compliance Requirements (Continued)

C Required Consultation Process (Continued)

Step	Action
2 (Cntd)	<ul style="list-style-type: none"> <li data-bbox="456 369 1481 506">• In the future, FWS will have recommended conservation measures to incorporate into project design to speed the consultation process. Users still will have to consult, it will just take less time and there will be fewer terms and conditions to incorporate post-consultation. <li data-bbox="456 552 1430 621">• The web site can also be queried by stressor, resources, activities, and/or species. This helps show the types of impacts FWS is concerned about. <p data-bbox="850 625 1040 657">NMFS Action</p> <p data-bbox="410 663 1357 732">NMFS has only a single, functional method of obtaining official protected resources lists, which is to formally request them.</p> <ul style="list-style-type: none"> <li data-bbox="410 779 1471 915">• NMFS currently has a nonfunctional web site. Until it is operational, only the "old school" option of formal requests is available. This is a letter from FSA to the Services specifying the proposed action and its location, and requesting an official list of protected resources. <li data-bbox="410 961 1471 1098">• NMFS is supposed to respond to a request for a protected resources list within 30 calendar days. If they do not, call and ask why and when it will be received, as FSA cannot proceed without it if there are NMFS species potentially impacted.
3	<p data-bbox="410 1115 1312 1146">Determine whether protected resources would be affected by proposal.</p> <ul style="list-style-type: none"> <li data-bbox="410 1192 1057 1224">• This step may require research by the reviewer. <ul style="list-style-type: none"> <li data-bbox="456 1270 1471 1339">• It is necessary to know the species and their habitat requirements (including seasonal and life cycle) to know if a proposal will impact them. <li data-bbox="456 1365 1406 1396">• The Services have this information readily available on their web sites. <li data-bbox="410 1442 1114 1474">• Questions and considerations include the following. <ul style="list-style-type: none"> <li data-bbox="456 1520 1365 1589">• What does species X need for the following life functions: feeding, drinking, nesting, breeding, rearing, migrating, and resting? <li data-bbox="456 1635 1471 1743">• When during the year does species X need those things? What time of year is this proposal going to be implemented? Are habitats that this species needs during that season found on the site? <li data-bbox="456 1789 1471 1858">• How and where does species X get the things it needs for each life function? Do any of these occur on the property proposed for the action?

2 FSA's Compliance Requirements (Continued)

C Required Consultation Process (Continued)

Step	Action
3 (Cntd)	<p>Example Considerations:</p> <p>Note: If farm operating loans are involved and actions have already been fully evaluated through the Section 7 process for Conservation Plans, Nutrient Management Plans, etc., additional separate consultation is not required.</p> <ul style="list-style-type: none"> • During summer months, many bat species, such as the Indiana bat, roost almost exclusively in trees. <ul style="list-style-type: none"> • If proposal is in the range of this species, does it involve removing trees during the summer? Could the project wait until fall to be implemented? • Indiana bats often roost in older, dead, or dying trees. What types of trees are being removed? Could the project be limited to younger trees with intact bark? • If the proposal provides for the use of pesticides, according to label requirements, consider the proximity to water bodies, wetlands, riparian areas, and nontarget species that will be adversely impacted by the pesticide, including those needed as food sources. <ul style="list-style-type: none"> • Consultations are often needed for pesticide uses because of the potential impacts to riparian areas and nontarget species, such as spraying for: <ul style="list-style-type: none"> • mosquitoes – mosquito larvae are an important food source to juvenile salmonids and other invertebrates • moths – moths can be one of bats' primary food sources and butterflies are often nontarget losses • vegetation – some butterflies use a single type of plant for all life functions within a very small area. • These impacts also should be considered for land applications of animal waste. • Construction, harvest, land application of waste, and mowing can temporarily or permanently remove habitats. Consider ground nesting species, burrowing species (such as birds, foxes, beetles, etc.), or those species with extremely limited habitat distribution and/or connectivity (they cannot just "fly away") before proposing to impact or remove these habitats.

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2 FSA's Compliance Requirements (Continued)

C Required Consultation Process (Continued)

Step	Action
3 (Cntd)	<ul style="list-style-type: none"> • Be aware of and avoid proposing to impact or remove key habitat features, such as perch sites, lekking sites, or caves. • Consider how the proposal could change vegetative cover in the area, particularly if converting from native species to nonnative species. Were there species that used the natives? What will they use once it is removed or converted? Will the action result in possible invasive species problems and/or require long-term weed management to control? • Consider noise impacts, as some species are quite sensitive to noise, particularly during nesting and brood rearing. • If converting from nonnative to native species, there will be a potential benefit to protected resources in the area. Be sure to note the beneficial impacts as well as the potential adverse effects. Benefits do not negate, balance, or outweigh adverse effects, but projects should get credit for their benefits when due.
4	<p>If protected resources would not be affected (a “no effect” determination), document the rationale in the administrative record (FSA-850/RD 1940-20/ RD 1940-21/RD 1940-22).</p> <ul style="list-style-type: none"> • Concurrence from the Services for a “no effect” determination is not required. • This ends consultation.
5	<p>If step 3 findings indicate listed or proposed species or critical habitat may be affected by the proposal, determine whether the expected effects would be adverse or not.</p>
6	<p>If the effects are not likely to be adverse (may affect, not likely to adversely affect), prepare a Biological Assessment (BA) and request concurrence from the Services.</p> <ul style="list-style-type: none"> • When FSA works with the Services, BA's can be referred to by other, less formal names, such as Biological Evaluations, consultation letters, etc. <ul style="list-style-type: none"> • They can be in letter format or prepared as separate analysis documents. • What is important is the content and language specifying that the documentation is for consultation under Section 7 of ESA. • With assistance from National Office staff, as necessary, and again using the information gathered during step 3, prepare a concise BA with the following information. <ul style="list-style-type: none"> • Description of action – what are you doing? Why, when, and how are you doing it?

2 FSA's Compliance Requirements (Continued)

C Required Consultation Process (Continued)

Step	Action
6 (Cntd)	<ul style="list-style-type: none"> • Description of specific area that may be affected by the action – where are you doing it? • Description of any proposed or listed species and/or critical habitat that may be affected by the action – what species and habitats are in the area during the project and/or the project's impacts (if impacts will outlive the project)? • Description of manner in which actions may affect proposed or listed species and/or critical habitat, with an analysis of cumulative effects – how will this project impact those protected resources, individually and cumulatively? <p>Note: Cumulative effects are defined under ESA as effects of other non-Federal actions that may occur in the action area, including State, tribal, local, or private activities that are reasonably certain to occur in the project area. This means users have to assess their project's impacts combined with the impacts of all the other ongoing non-Federal projects. Note that this is a narrower definition of cumulative effects than under NEPA.</p> <ul style="list-style-type: none"> • Description of relevant reports, including any environmental assessments, Environmental Impact Statements, BA's, biological opinions, or other analyses prepared for the action – where else has this project been analyzed, such as the NEPA document or the results of previous Section 7 determinations for similar actions? • Description of any other relevant studies or other information available on the action and affected proposed or listed species and/or critical habitat – what other information did you use in estimating the impacts? • BA's are not intended to be voluminous descriptions of all projects, species, or impacts. They are intended to be summary documents with enough information provided to: <ul style="list-style-type: none"> • demonstrate FSA's rationale for making the determination • allow the Services to concur or not with FSA's determination. • If the Services need additional information, they will ask for it. <p>Note: If BA is required and assistance is needed, contact the National Environmental Compliance Manager. See subparagraph 3 C.</p>

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2 FSA's Compliance Requirements (Continued)

C Required Consultation Process (Continued)

Step	Action
7	<p>After reviewing BA, if the Services concur with the determination that effects are not likely to be adverse, they will provide a concurrence letter to that effect. This ends consultation.</p> <ul style="list-style-type: none"> • If the Services include terms and conditions in their concurrence letters, incorporate those as required elements of the action. Failure to do so may invalidate their concurrence and the Section 7 compliance. • In the past, FSA has received letters intended as guidance from the Services, but the letters specify that they are not part of the consultation process. • In this case, users must continue to work with the Services until users have a letter from the Services verifying the completion of the consultation process.
8	<p>The Services have 30 calendar days to respond following submission of BA to determine whether effects are likely to be adverse.</p> <ul style="list-style-type: none"> • The 30 calendar days are policy and guidance for the Services, but the reality is that it often takes longer. • To guard against this, add to the letter requesting concurrence that the Services should notify users within 30 calendar days if the Services will need additional time to complete their portion of the consultation. If users do not hear from the Services within that time, users will assume concurrence has been granted and the consultation process has been completed. This should at least let users know if users will need to wait longer than 30 calendar days for the Services' response. • If effects are likely to be adverse, FSA will not fund this action, as FSA does not have the staff and/or funding to accommodate the compliance needed for these proposals. This ends consultation.
9	<p>Complete the Section 7 consultation administrative record for the file. Documentation of the steps in the consultation process is required to ensure its continued utility and success.</p> <p>Document the Section 7 consultation process in:</p> <ul style="list-style-type: none"> • FSA-850 • RD 1940-20, RD 1940-21, or RD 1940-22 • Class II Environmental Assessments (1-EQ, Exhibit 21).

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2 FSA's Compliance Requirements (Continued)

C Required Consultation Process (Continued)

Step	Action
9 (Cntd)	<p>The administrative file should also contain the following:</p> <ul style="list-style-type: none">• records of telephone contacts, including name of the caller, date, and purpose of the call as it relates to the proposed action and/or consultation• advice or recommendations provided by the Services' biologists• meeting minutes• other notes to the file. <p>Be sure documentation from the Services specifically states that it is for consultation purposes and/or is part of the consultation process. Without this acknowledgement from the Services, consultation has not occurred.</p>
10	<p>Do not make a NEPA determination before completion of the Section 7 consultation process, as that is considered "pre-decisional" and does not comply with the requirements in the law.</p>

3 Action

A County Office Action

County Offices shall ensure that all required steps are completed and documented accordingly when conducting Section 7 consultation with the Services.

B State Office Action

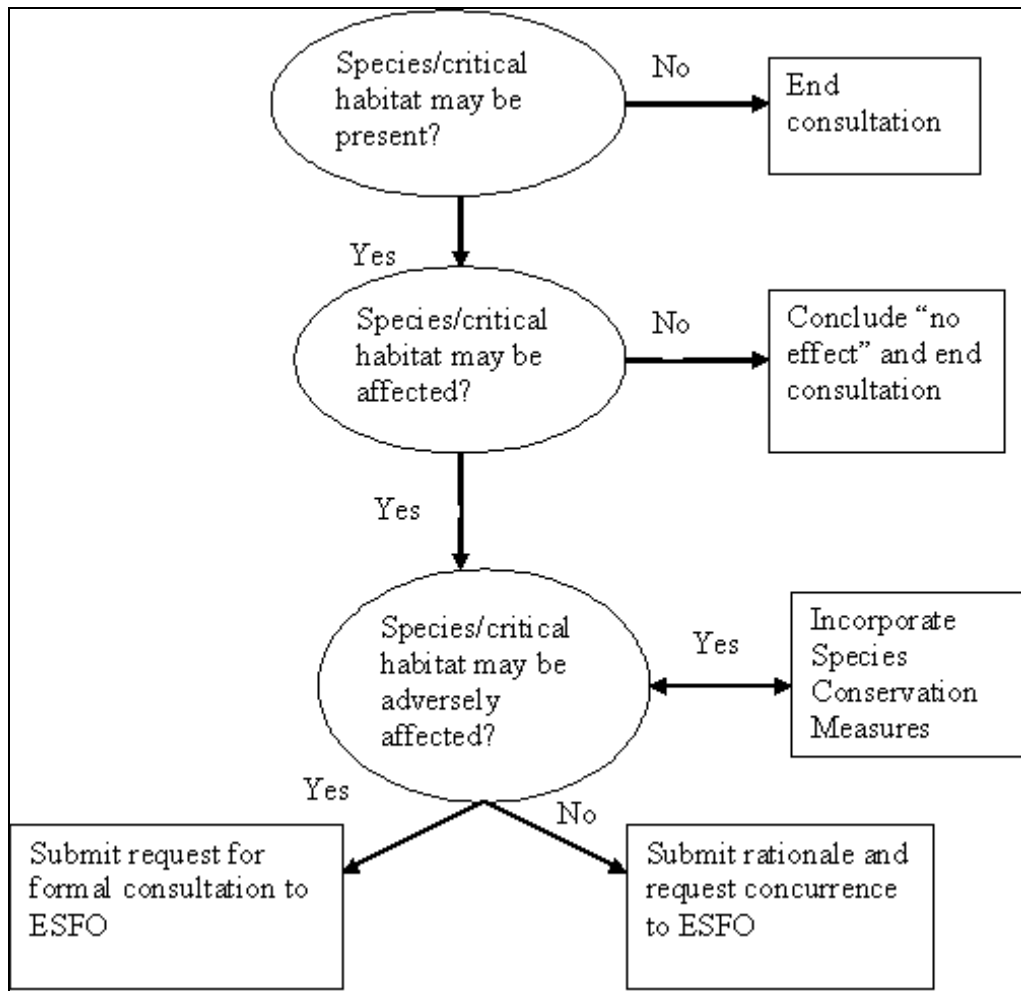
State Offices shall ensure that County Offices follow the procedure and policy identified in this notice.

C Contact

For questions about this notice or the required Section 7 consultation process, contact Nell Fuller, FSA National Environmental Compliance Manager, by either of the following:

- e-mail at nell.fuller@wdc.usda.gov
- telephone at 202-720-6303.

ESA Section 7 Process General Flowchart



Note: ESFO is the FWS Ecological Services Field Office.

Required ESA Section 7 Consultation Process

Step	Action
1	Receive the proposal or application.
2	Acquire the protected resources list from the Services.
3	Determine whether protected resources would be affected by proposal.
4	If protected resources would not be affected (a “no effect” determination), document the rationale in the administrative record (FSA-850/RD 1940-21/RD 1940-22). This ends consultation.
5	If listed or proposed species or critical habitat may be affected by the proposal, determine whether the expected effects would be adverse or not.
6	Using the information gathered in step 3, if the effects are not likely to be adverse (may affect, not likely to adversely affect), prepare BA and request concurrence from the Services.
7	After reviewing BA, if the Services concur with the determination that effects are not likely to be adverse, they will provide a concurrence letter to that effect. This ends consultation.
8	The Services have 30 calendar days to respond following submission of BA to determine whether effects are likely to be adverse. Note: If effects are likely to be adverse, FSA will not fund this action, as we do not have the staff and/or funding to accommodate the compliance needed for such proposals. This ends consultation.
9	Complete the Section 7 consultation administrative record for the file.
10	Do not make a NEPA determination before completion of the Section 7 consultation process, as that is considered “pre-decisional” and does not comply with the requirements in the law.